BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by **GAYLE McCORMICK** From demotion from the position of Facility Captain to the position of Correctional Lieutenant with High Desert State Prison, Department of Corrections at Susanville	)	SPB Case No. 99-1549 **BOARD DECISION** (Precedential) NO. 00-05 May 2, 2000

APPEARANCES: Mark R. Kruger, attorney, on behalf of appellant, Gayle McCormick; Kenneth R. Hulse, Labor Relations Counsel, Department of Personnel Administration, on behalf of respondent, Department of Corrections.[1]

BEFORE: Florence Bos, President; Ron Alvarado, Vice President; Richard Carpenter, William Elkins and Sean Harrigan, Members.

DECISION

This case is before the State Personnel Board (Board) after the Board rejected the Proposed Decision of the Board revoking appellant Gayle McCormick's (appellant) demotion from the position of Facility Captain to the position of Correctional Lieutenant.

Respondent Department of Corrections (Department) demoted appellant based upon allegations that she: (1) modified the "lockdown" status of Caucasian inmates at High Desert State Prison (HDSP) without first obtaining permission from the warden; (2) failed to conduct a facility-wide weapons search in a timely manner; and (3) while assigned to an administrative team to interview inmates who had been transferred from HDSP, she failed to review transfer records that indicated the prisoners had not yet

[1] The parties did not present oral arguments and submitted the matter to the Board based on written briefs.

been transferred to Pelican Bay State Prison (PBSP), thus causing appellant and two other officers to needlessly travel to PBSP, thereby wasting state resources.

In this Decision, the Board finds that the allegation that appellant improperly modified the lockdown status of caucasian inmates at HDSP was not served in a timely manner as required by Government Code section 3304 and, as a result, dismisses that allegation. The Board further finds that the remaining allegations were not established by a preponderance of the evidence. Therefore, the Board revokes appellant's demotion to the position of Correctional Lieutenant.

BACKGROUND[2]

(Employment History)

Appellant was first employed by the Department as a Correctional Officer at San Quentin State Prison on June 5, 1978. She promoted to the position of Correctional Sergeant at Correctional Training Facility, Soledad, on January 9, 1984. She promoted to the position of Associate Governmental Program Analyst on October 22, 1984. She promoted to the position of Parole Agent I on December 1, 1985, to the position of Parole Agent II on May 1, 1990, and to the position of Parole Agent III on December 1, 1990. On April 4, 1996, she promoted to the position of Facility Captain at HDSP where she remained until her demotion, except for a brief period of time from July 1 to November 3, 1997, when she served as a Correctional Captain.

[2] The findings of fact are taken substantially from the Proposed Decision.

(Prior Disciplinary Actions)

Appellant received a Letter of Instruction (LOI) on April 27, 1998, for inappropriate and unprofessional comments to an African-American staff member at HDSP. She received another LOI on August 21, 1998, for providing confidential "unlock" information to the inmate population, thereby jeopardizing an intended search for weapons and contraband. Appellant has received no prior formal adverse actions.

Factual Summary

(Limited Release of Caucasian Inmates from Lockdown Status)

On April 5, 1998, appellant was assigned as the Facility Captain of Facility B at HDSP. The caucasian inmates were on lockdown status as a result of racial violence.[3] As a result of the lockdown status, Warden Susan Yearwood (Yearwood) instituted a daily executive staff lockdown meeting with captains and above (managers). During these meetings, Yearwood or Chief Deputy Warden Charles Knowles (Knowles) would discuss the progress made to allow a gradual return to normal programming for the inmates. Also discussed during these meetings were plans to reduce tensions between caucasian and African-American inmates, activities to get inmates to talk with one another, and proposals of what to do next. To avoid misunderstandings and to ensure that proposed plans were well thought out in advance, Yearwood instructed the meeting participants to submit any proposals for changes to the current lockdown status in writing.

[3] HDSP is a Level 3 and 4 institution (Maximum security). On March 26, 1998, a caucasian inmate attacked an African-American inmate, resulting in serious injuries. A correctional officer shot and killed an inmate in order to quell the disturbance.

As a result of the lockdown status, the caucasian inmates were being fed in their cells rather than in the dining hall. At the daily executive staff lockdown meeting on April 6, 1998, appellant stated that she had identified the perpetrators of a December 26, 1997 attack on a child molester, that she had moved the leaders of the attack to the administrative segregation unit, and that it was now safe to have the caucasian inmates eating in the dining hall. Appellant then proposed returning the caucasian inmates to the dining hall for feeding, starting April 7, with the breakfast meal when more staff were present, as opposed to the evening meal of April 6.

Yearwood believed the proposal was premature, but stated that appellant should put the proposal in writing. This was pursuant to Yearwood's policy of approving such requests in writing. At this point, Yearwood believed that the proposal was only that, a proposal, and that appellant still needed Yearwood's written approval prior to implementing the proposal. Appellant, on the other hand, believed that she had approval to feed the caucasian inmates in the dining hall, and that the written memorandum was merely for the purpose of documenting the change in lockdown status.

Appellant had never been required to put such a proposal in writing before, so she contacted Associate Warden Sal Mennuti (Mennuti) to ask what she needed to do. Mennuti provided instructions as to the required content of the proposal.

Appellant intended to put the proposal in writing on that same day, but something else came up and she was not able to complete it that day. She telephoned Mennuti at approximately 4:30 p.m. and informed him about the status of the proposal. Mennuti stated that she could complete it later. In so stating, Mennuti did not intend to give

approval to appellant to begin dining hall feedings without first submitting the written proposal. Instead, Mennuti believed that appellant would prepare the proposal and then obtain Yearwood's approval prior to implementing the proposed change. Appellant still believed that she had Yearwood's approval, and that she could submit the written proposal at a later date.

On April 7, 1998, as the result of appellant's orders of April 6, the caucasian inmates were fed separately from the African-American inmates in the dining hall.[4] This allowed more inmates out of their cells and increased the likelihood of another racial incident occurring, though no incident actually occurred.

On that same date, Mennuti learned that caucasian inmates were fed in the dining hall. He immediately instructed the Correctional Lieutenant in charge to terminate dining hall feeding of caucasian inmates, and order the caucasian inmates fed in their cells. Mennuti then wrote a memorandum to Yearwood describing appellant's actions. Yearwood directed Mennuti to begin an investigation into appellant's actions that same day.

The subsequent investigation concluded that appellant had disobeyed Yearwood's instructions to obtain her written consent prior to modifying the lockdown status of the caucasian inmates.

(Weapons Search)

Just prior to April 24, 1998, metal stock (valve handles) capable of being converted into weapons were discovered missing from the vocational yard at Facility B.

[4] Normally, while not under lockdown, caucasian inmates are fed separately from African-American inmates.

No inventory had previously been taken of the valve handles, and an undetermined number of them were missing. Knowles met with appellant the following day, a Friday afternoon, and ordered her to conduct a complete search of Facility B. Appellant said that she would do it and did not indicate any expected problems with conducting the search over the weekend. She understood the search to include all common areas, the vocational area, the program areas, 500 cells, and the 1,200 inmates – in short, the entire Facility. Appellant had conducted approximately 20 similar searches in her career and knew how to do them. Knowles did not give her a deadline to complete the search. Such a search can take up to one week to complete because it is a very involved, tedious process.

Appellant instructed her staff to begin a search of the common areas immediately after the Friday evening meal, after the inmates had been placed in their cells.

On Saturday, the inmates were being tested for tuberculosis and were locked down in their cells. This testing procedure requires needles to be used. Appellant did not have sufficient staff to both continue the search and monitor the tuberculosis testing; consequently she postponed the search until all needles were accounted for and removed from the Facility at approximately 1:30 p.m. At approximately 7:00 p.m., appellant was informed that the inmates who had been locked down had not had the opportunity for showers. Affording the inmates an opportunity to shower is a legal requirement, and appellant again postponed the search until the showers had been completed, since she did not have sufficient staff to monitor both activities simultaneously.

Appellant had completed searching all of the common areas, except for a part of the vocational area, by Sunday. She intended to have her staff finish searching the vocational area when vocational staff returned from the weekend,[5] and then begin a search of the cells.

When Mennuti arrived on Monday morning, he learned that the search had not been completed and demanded to know why that was the case. Appellant informed him that it was impossible to complete the search over one weekend.

If appellant had hired 20 permanent intermittent employees (PIEs), she could have completed the search in one day. She did not request to hire PIEs because Knowles had informed her after a March 1998 search that budget constraints would prevent the use of PIEs to conduct searches. Appellant completed the search on April 29, 1998, five days after she had been instructed to perform the search.

(Inefficient Use of State Resources)[6]

In August 1998, appellant was assigned to head an administrative team to interview inmates that had been transferred from HDSP. On August 25, appellant erroneously assumed that two inmates had been transferred from HDSP to PBSP. Appellant traveled to PBSP in her own vehicle to interview those inmates. She intended to go on vacation the following day. Captain McClure (McClure) and Lieutenant Kirsh (Kirsh), who were to assist appellant in interviewing the inmates, traveled to PBSP in a state vehicle. It takes at least six hours to drive from HDSP to PBSP.

[5] Vocational staff possess "take home" keys, which meant that appellant did not have access to certain portions of the vocational area until these staff members returned on Monday.

[6] The parties stipulated to the findings set forth in this count.

Upon arrival at PBSP, appellant learned that the two inmates had not, in fact, been transferred from HDSP. Appellant left PBSP at approximately 4:30 p.m. McClure and Kirsh remained to complete other pre-assigned duties.

Appellant did not request per diem, meal allowance, or mileage, despite the fact that August 25 was a workday for appellant. No state resources were wasted as a result of the trip.

(Notice of Adverse Action)

As a result of the above-described activities, the Department served appellant with a Notice of Adverse Action (NAA), alleging that her conduct constituted violations of Government Code section 19572, subdivisions (c) inefficiency, (d) inexcusable neglect of duty, (m) discourteous treatment of the public or other employees, (o) willful disobedience, and (t) other failure of good behavior either during or outside of duty hours which is of such a nature that it causes discredit to the appointing authority or the person's employment. Appellant was thereafter demoted from the position of Facility Captain to the position of Correctional Lieutenant.

HDSP Employee Relations Officer (ERO), Bryan Kingston (Kingston), signed a proof of service stating that on April 6, 1999, he placed the original NAA, together with discovery materials and seven audio cassette tapes, in a sealed envelope addressed to appellant, "and depositing said receipt requested and fully prepaid postage envelope at Susanville, California" [Sic]. The envelopes[7] mailed to appellant were not mailed on April 6, 1999, as stated, but rather on April 7, 1999. Instead of bearing postage prepaid,

[7] Two envelopes were mailed. One with audio tapes, and one without audio tapes.

they were franked with HDSP's postal meter dated April 7, 1999. Appellant did not receive the NAA until April 17, 1999, when she checked her Post Office box.

Procedural Summary

Appellant filed an appeal with the Board concerning her demotion, and a hearing on the matter was conducted on August 17, 1999. During the hearing, appellant moved to dismiss the allegation that she violated Yearwood's instructions when she failed to obtain written permission to modify the lockdown status of caucasian inmates on April 7, 1998. According to appellant , that allegation violated her rights under Government Code section 3304 (Public Safety Officers Procedural Bill of Rights Act (POBOR)), as the Department failed to serve the NAA within one year after it began its investigation into that allegation. The ALJ took the matter under submission, and the parties went forward with the hearing.

The ALJ subsequently issued a Proposed Decision, wherein he found that the Department had violated appellant's POBOR due process rights. As a result, he dismissed the allegation that appellant violated Yearwood's instructions concerning modification of the caucasian inmate's lockdown status. The ALJ further found that appellant had completed the weapons search within a reasonable period of time, given the resources at her disposal. He also found that state resources had not been wasted as a result of appellant failing to ascertain that inmates had not been transferred to PBSP prior to traveling to that institution to interview the inmates. Accordingly, the ALJ dismissed those allegations as well and revoked appellant's demotion.

During its meeting of November 2, 1999, the Board rejected the Proposed Decision of the ALJ in order to decide the matter itself.

ISSUE

Does the Board have jurisdiction to determine whether the Department violated the Public Safety Officers Procedural Bill of Rights Act?

DISCUSSION

(Jurisdiction)

POBOR sets forth specific due process protections afforded peace officers suspected or accused of misconduct. Government Code section 3304 provides, in pertinent part:

> …no punitive action … shall be undertaken for any act, omission, or other allegation of misconduct if the investigation of the allegation is not completed within one year of the public agency's discovery by a person authorized to initiate an investigation of the allegation of an act, omission, or other misconduct … In the event that the public agency determines that discipline may be taken, it shall complete its investigation and notify the public safety officer of its proposed disciplinary action within that year …[8]

The Act further provides:

> (a) It shall be unlawful for any public safety department to deny or refuse to any public safety officer the rights and protections guaranteed them by this chapter.
>
> (b) The superior court shall have initial jurisdiction over any proceeding brought by any public safety officer against any public safety department for alleged violations of this chapter.
>
> (c) In any case where the superior court finds that a public safety department has violated any of the provisions of this chapter, the court shall render appropriate injunctive or other extraordinary relief to remedy the violation and to

[8] Gov't Code § 3304(d).

> prevent future violations of a like or similar nature, including, but not limited to, the granting of a temporary restraining order, preliminary, or permanent injunction prohibiting the public safety department from taking any punitive action against the public safety officer.[9]

The legislative history of section 3309.5 shows it was specifically designed to allow an officer to pursue a remedy immediately in the courts for POBOR violations, without first requiring the officer to wait for judicial review after sometimes lengthy administrative consideration of the alleged violations.[10] Case law has confirmed that an officer is not required to first exhaust his or her administrative remedies concerning the alleged violation prior to seeking relief from the superior court, and may in fact pursue an administrative and judicial remedy simultaneously.[11] Furthermore, an officer may bring an action pursuant to the provisions of Section 3309.5 after a final administrative decision has been rendered concerning the alleged officer misconduct.[12]

What neither the Act's legislative history nor case law has made clear, however, is whether the grant of initial jurisdiction to the superior court precludes an administrative agency from considering alleged POBOR violations in those cases where the officer voluntarily submits the matter to the administrative agency, as opposed to the superior court, for initial consideration of the alleged violation.

The only published decision even touching the issue is that of Zazueta v. County of San Benito[13] which involved a peace officer who elected to submit his dismissal to

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[9] Gov't Code § 3309.5.

[10] Mounger v. Gates (1987) 193 Cal.App.3d 1248, 1256.

[11] Id., at 1256-57. See also Gales v. Superior Court (1996) 47 Cal.App.4th 1596.

[12] Gales, 47 Cal.App.4th at 1603.

[13] (1995) 38 Cal.App.4th 106.

arbitration. During the course of the arbitration, the officer contended certain evidence used to support his dismissal had been obtained in violation of his rights under POBOR, and that the evidence should have been excluded. The arbitrator denied the officer's motion to exclude the evidence and upheld the dismissal.

Thereafter, the officer filed a petition for writ of mandate seeking judicial review pursuant to both Code of Civil Procedure section 1094.5, and Government Code section 3309.5. The officer argued that the arbitration award conflicted with public policy because it did not address the alleged POBOR violations. The court ruled that the officer waived his right to judicial review of the alleged POBOR violation by participating in the arbitration and by never seeking judicial review until after the arbitrator had ruled against him. In so ruling, the court found that having chosen to arbitrate the issue, the court could only review the issue in the same manner that it reviews all arbitration claims.

While not directly dispositive of the issue before the Board, Zazueta certainly implies that it was permissible for the arbitrator to consider the issue of whether the officer's POBOR rights had been violated. This implicit ruling is consistent with the legislative intent underlying POBOR – that public safety officers be afforded the *option* of seeking *immediate* relief in the superior court for alleged POBOR violations, without first seeking administrative review of the issue. Nothing in the language of the statute, the legislative history, or the case precludes our conclusion that in those cases where the officer declines to seek immediate review by the superior court, and chooses instead to submit the matter to administrative review, the officer should be permitted to do so. In short, while the legislative history underlying Section 3309.5 appears to

indicate that the public safety officer has the option of seeking immediate superior court review of alleged POBOR violations, it does not compel a conclusion that he or she is required to exercise that option.

It also appears, however, that should the officer choose to litigate the POBOR issue before an administrative agency, once the agency renders a decision the officer will be deemed to have waived his or her right to seek independent judicial review of the alleged POBOR violation, and will be limited to seeking review of the administrative agency's decision.

(POBOR Claim)

Since the Department initiated its investigation concerning appellant's unilateral modification of the lockdown policy on April 7, 1998, pursuant to Government Code section 3304(d), it was required to notify appellant of the proposed disciplinary action by April 6, 1999. The evidence presented indicates that ERO Kingston intended the NAA to be mailed on April 6, 1999. However, the envelope containing the NAA was not actually processed by HDSP mailroom personnel until April 7, 1999. Even were the Board to accept the Department's contention that service was completed and effective when the NAA was placed in the United States Mail, the fact remains that the NAA was not placed in the United States Mail by HDSP mailroom personnel until April 7, 1999, and service was not effective until at least that date.

Since Government Code section 3304(d) required the Department to notify appellant of this particular allegation no later than April 6, 1999, the Department did not provide timely notice to appellant of the allegation. As a result, the Board dismisses the allegation that appellant improperly modified the lockdown status of caucasian inmates.

(Failure to Conduct Timely Weapons Search)

The Board has defined "inefficiency" as either a continuous failure by an employee to meet a level of productivity set by other employees in the same or a similar position, or as a failure to produce an intended result with a minimum of waste, expense, or unnecessary effort.[14] Inexcusable neglect of duty is the intentional or grossly negligent failure to exercise due diligence in the performance of a known official duty.[15] In assessing whether conduct is "simple negligence" or "gross negligence," the Board will examine the degree of seriousness of the harm that could result to the public as a result of the employee's negligence.[16]

Since appellant had previously been informed by Knowles that it would not be permissible to hire PIEs for the purpose of conducting facility searches, appellant had good reason not to hire additional employees to conduct the weapons search in a more timely manner. The evidence also demonstrates that the search was impeded by several circumstances beyond appellant's control. More specifically, appellant was required to monitor tuberculosis tests of the inmates and to permit the locked down inmates to shower on Saturday. In addition, vocational staff had the only keys to certain areas, and they were not at the institution during the weekend. Consequently, the Board finds that appellant was neither inefficient nor negligent in the performance of her duties concerning the weapons search.

[14] Robert Boobar (1993) SPB Dec. No. 93-21.

[15] Ulysses Washington (1993) SPB Dec. No. 93-10.

[16] John Arnold and Miguel Leal (1996) SPB Dec. No. 96-17.

Willful disobedience requires that one knowingly and intentionally violated a direct command or prohibition.[17] What is required is evidence demonstrating that a specific command or prohibition was directed at the employee by his or her employer, which was disobeyed.[18]

In the present case, no evidence was presented demonstrating that appellant was ordered to complete the weapons search over the course of the weekend. Appellant had previous experience conducting such extensive facility-wide searches, some of which took up to one week to complete. Given this lack of clear direction concerning the time period in which the search was to be completed, and appellant's otherwise reasonable belief that the search could be conducted over a several day period, the Board finds that appellant's conduct does not constitute willful disobedience.

Discourteous treatment of the public or other employees generally involves conduct where a person displays hostility towards others, speaks in an abrasive tone of voice, and has a brusque demeanor.[19] Other failure of good behavior requires misconduct that must bear a rational relationship to the employment and be of such a character that it can easily result in the impairment or disruption of the public service.[20]

There was no evidence presented demonstrating that appellant acted in a less than professional manner concerning the conduct of the weapons search, or that she was otherwise discourteous to Department employees, inmates, or members of the

[17] Coomes v. State Personnel Board (1963) 215 Cal.App.2d 770.

[18] Richard Hildreth (1993) SPB Dec. No. 93-22.

[19] Walker v. State Personnel Board (1971) 16 Cal.App.3d 550.

[20] Yancey v. State Personnel Board (1993) 167 Cal.App.3d 478.

public concerning the weapons search. Therefore, the Board finds that appellant did not engage in discourteous behavior with regard to the weapons search.

Likewise, the Board finds that given the circumstances presented, appellant's failure to complete the weapons search over the weekend did not disrupt or impair the public service. Consequently, her conduct does not constitute other failure of good behavior.

(Waste of State Resources)

There is no dispute that it would have been prudent for appellant to have ascertained whether the inmates in question had been transferred to PBSP prior to making the approximately six-hour journey to that institution to interview them. However, the fact remains that the two other employees who also made the trip were able to attend to other scheduled matters while at PBSP. Moreover, appellant did not charge the state for mileage or seek compensation for her meals as a result of the trip. While appellant did fail to produce the intended result of the trip, the only wasted effort was essentially six hours of her own time spent in traveling to PBSP. This one-time failure on appellant's part does not constitute inefficiency. Similarly, appellant's conduct amounted to simple negligence at best and does not constitute inexcusable neglect of duty.

There was no evidence presented indicating that appellant was directed to ascertain whether the inmates in question had, in fact, been transferred to PBSP prior to traveling to that institution. The Board finds, therefore, that while appellant may have been negligent, she did not willfully disobey a direct order or instruction. As a result, her actions do not constitute willful disobedience.

Finally, appellant's simple negligence in failing to correctly ascertain the location of the inmates in question does constitute discourtesy toward either McClure or Kirsh. Moreover, such simple negligence is not the type of conduct that can easily result in the impairment or disruption of the public service. Consequently, the Board finds that appellant's actions in this regard do not constitute other failure of good behavior.

CONCLUSION

While both the express provisions of POBOR and case law on the subject are somewhat vague, the Board finds, and the Department essentially concedes, that the Board may rule on alleged POBOR violations even if the appellant has not filed a complaint concerning the alleged violation with the superior court. Accordingly, the Board finds that, with regard to the allegation that appellant improperly modified the lockdown status of caucasian inmates at HDSP without first submitting a written plan to Yearwood, the Department failed to notify appellant of that allegation in a timely manner as required by POBOR. That allegation must, therefore, be dismissed.

In addition, the Board finds that, given the circumstances presented, appellant completed the weapons search in a reasonable period of time. Hence, the Board dismisses the allegation that appellant failed to conduct a timely search for weapons. The Board further finds that, while appellant should have ascertained the location of certain inmates prior to traveling to PBSP, her actions caused only a de minimis expenditure of additional state resources. Given the minimal harm caused by appellant's actions, the Board also dismisses the allegation that appellant wasted state resources.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is hereby ORDERED that:

1. The demotion of Gayle McCormick from the position of Facility Captain to the position of Correctional Lieutenant is revoked;
2. Pursuant to Government Code section 19584, the Department of Corrections shall pay to Gayle McCormick all back pay, interest, and benefits, if any, that would have accrued to her had she not been demoted from the position of Facility Captain to the position of Correctional Lieutenant;
3. This matter is hereby referred to the Chief Administrative Law Judge and shall be set for hearing on written request of either party in the event the parties are unable to agree as to the salary and benefits due appellant.
4. This decision is certified for publication as a Precedential Decision pursuant to Government Code section 19582.5.

STATE PERSONNEL BOARD

Florence Bos, President
Ron Alvarado, Vice President
Richard Carpenter, Member
William Elkins, Member
Sean Harrigan, Member

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on May 2, 2000.

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Walter Vaughn
Executive Officer
State Personnel Board

[McCormick-dec]